Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-146

RUDOLPH S. SLAGLE, *et al.*,

Appellants,

v.

LUTHER PARKER, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

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APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

The appellants appeal from the final judgment of the Supreme Court of Alabama holding that Section 25-5-11 of the Alabama Code of 1975—which *does not immunize* co-employees from suit by an employee receiving a *work-related injury*—*immunizes* co-employees from suit by the dependents of a deceased employee who received a *fatal work-related injury*, and that Section 25-5-11, as thus construed, does not violate the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. The decision of

the Supreme Court of Alabama was rendered on April 6, 1979, and rehearing was denied May 4, 1979.

Pursuant to Rule 15(3), three cases from the Supreme Court of Alabama involving identical questions have been consolidated on this appeal. The parties to these three cases are as follows: Rudolph Slagle, Appellant, v. Luther Parker, J. F. Newman, Danny Altman, Ed Miller, and Leon Folsom, Appellees; Helen J. Hamrick, Appellant, v. Max Edward, Max Powell, Cecil Colburn, Sam Smith, C. H. Campbell, Harold Roper, Jim Bradfield, and Paul Atchison, Appellees; and Elcer Mae Mason, Appellant, v. Randy Adams, J. W. Hinson, Billy Alverson, and Howard Buchanan, Appellees.

OPINION BELOW

The opinion of the Supreme Court of Alabama, which appears in the appendix hereto, p. 1a, *infra*, is reported at 370 So.2d 947 (Ala. 1979).

JURISDICTION

The judgment of the Supreme Court of Alabama, affirming the trial court's granting of summary judgments to appellees, was entered on April 6, 1979. See opinion below, p. 1a, *infra*. A motion for rehearing was entertained and denied on May 4, 1979. See opinion below, p. 1a, *infra*.

A notice of appeal to this Court was duly filed in the Supreme Court of Alabama on July 2, 1979. See appendix, p. 12a, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of rehearing by the Supreme Court of Alabama. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

Whether Section 25-5-11 of the Alabama Code of 1975 [Ala. Code tit. 26, § 312, as amended], as construed to deny a wrongful death action arising out of the same breach of duties for which a personal injury action would lie had decedent lived, violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Whether Section 25-5-11 of the Alabama Code of 1975 [Ala. Code tit. 26, § 312, as amended], as construed to deny a wrongful death action arising out of the same breach of duties for which a personal injury action would lie had decedent lived, violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Ala. Code § 25-5-11 (1975) [Ala. Code tit. 26, § 312, as amended]:

> (a) Where the injury or death for which compensation is payable under this chapter was caused under circumstances also creating a legal liability for damages on the part of any party other than the employer, whether or not such party is subject to the provisions of this chapter, the employee, or his dependents in case of his death, may proceed against the employer to recover compensation under the

chapter or may agree with the employer upon the compensation payable under this chapter, and, at the same time, may bring an action against such other party to recover damages for such injury or death, and the amount of such damages shall be ascertained and determined without regard to this chapter; provided, however, that neither an officer, director, agent, servant or employee of the same employer . . . shall be considered a party other than the employer against whom such an action may be brought. . . .

Ala. Code § 6-5-410 (1975):

(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the state of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.

(b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

(d) Such action must be commenced within two years from and after the death of the testator or intestate.

* * *

RAISING THE FEDERAL QUESTION

The appellants' claim that Section 25-5-11 of the Alabama Code of 1975 [Ala. Code tit. 26, § 312, as amended] violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution was raised and argued in the Supreme Court of Alabama. See opinion below, p. 2a, *infra*. The Alabama Supreme Court expressly considered and rejected the federal constitutional claims. *Id.*

STATEMENT OF THE CASE

On August 6, 1974, Dennis Slagle, in the course of his employment with Reynolds Metals Company, a corporation in Sheffield, Alabama, suffered fatal injuries. Reynolds Metal Company paid all benefits due under the Alabama Workmen's Compensation Act on account of Dennis Slagle's death.

On November 10, 1975, Rudolph Slagle, the father of Dennis Slagle, commenced this action for the wrongful death of his minor son in the Tenth Judicial Circuit of Alabama. Luther Parker, J. F. Newman, Danny Altman, Ed Miller and Leon Folsom, supervisory co-employees of plaintiff's decedent, were named as party defendants. On September 27, 1977, the Circuit Court for the Tenth Judicial Circuit of Alabama rendered a summary judgment in favor of the co-employee defendants. This summary judgment was based on the immunity provisions of the Alabama Workmen's Compensation Act, as set forth in Ala. Code § 25-5-11 (1975) [Ala. Code tit. 26, § 312, as amended]. Plaintiff opposed this summary judgment on the basis that Ala. Code § 25-5-11 (1975) violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Plaintiff appealed from this summary judgment to the Supreme Court of Alabama, reiterating his Fourteenth Amendment claims. The Supreme Court of Alabama affirmed the judgment rendered by the trial court, expressly holding that the co-employee immunity granted by Ala. Code § 25-5-11 (1975) [Ala. Code tit. 26, § 312, as amended] in wrongful death actions does not violate the Fourteenth Amendment.

On January 27, 1976, Max Mason, in the course of his employment with Buchanan Contracting Company, suffered fatal injuries. Buchanan Contracting Company paid all benefits due under the Alabama Workmen's Compensation Act on account of Max Mason's death.

On January 26, 1978, Elcer Mae Mason, the mother of Max Mason, instituted this action for the wrongful death of her son in the Tenth Judicial Circuit of Alabama. Randy Adams, J. W. Hinson, Billy Alverson, and Howard Buchanan, supervisory co-employees of plaintiff's decedent, were named as party defendants. On April 14, 1978, the Circuit Court of the Tenth Judicial Circuit of Alabama granted a final order dismissing the co-employee defendants. This order of dismissal was based on the immunity provisions of the Alabama Workmen's Compensation Act, as set forth in Ala. Code § 25-5-11 (1975) [Ala. Code tit. 26, § 312, as amended]. Plaintiff opposed this dismissal on the basis that Ala. Code § 25-5-11 (1975) violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

Plaintiff's appeal from this dismissal to the Supreme Court of Alabama was consolidated with *Rudolph Slagle v. Luther Parker, et al.*, and *Helen J. Hamrick v. Max Edward, et al.* The Supreme Court of Alabama affirmed the judgment rendered by the trial court, expressly

holding that the co-employee immunity granted by Ala. Code § 25-5-11 (1975) [Ala. Code tit. 26, § 312, as amended] in wrongful death actions does not violate the Fourteenth Amendment.

On December 9, 1974, Douglas Hamrick, in the course of his employment with United States Pipe & Foundry Company, suffered fatal injuries. United States Pipe & Foundry Company paid all benefits due under the Alabama Workmen's Compensation Act.

On October 18, 1974, Helen J. Hamrick, the wife of Douglas Hamrick, filed this action for the wrongful death of her husband, in the Tenth Judicial Circuit of Alabama. Max Edward, Max Powell, Cecil Colburn, Sam Smith, C. H. Campbell, Harold Roper, Jim Bradfield and Paul Atchison, supervisory co-employees of plaintiff's decedent, were named as party defendants. On October 19, 1977, the Circuit Court for the Tenth Judicial Circuit of Alabama granted a summary judgment in favor of the co-employee defendants. This summary judgment was based on the immunity provisions of the Alabama Workmen's Compensation Act, as set forth in Ala. Code § 25-5-11 (1975) [Ala. Code tit. 26, § 312, as amended]. Plaintiff opposed this summary judgment on the basis that Ala. Code § 25-5-11 (1975) violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Plaintiff's appeal to the Supreme Court of Alabama from this summary judgment was consolidated with *Rudolph Slagle v. Luther Parker, et al.*, and *Elcer Mae Mason v. Randy Adams, et al.* The Supreme Court of Alabama affirmed the judgment rendered by the trial court, expressly holding that the co-employee immunity granted by Ala. Code § 25-5-11 (1975) [Ala. Code tit.

26, § 312, as amended] in wrongful death cases does not violate the Fourteenth Amendment.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Fourteenth Amendment questions raised by Alabama's statute prohibiting a third-party wrongful death action for job-related deaths when the deceased worker could have maintained a personal injury action had he lived are novel and substantial. They have never been treated by this Court.

In order to appreciate the constitutional issues presented by this appeal, it is necessary to take a brief look at the history of the third-party provisions of Alabama's Workmen's Compensation Act. Prior to September 1973, the injured employee or his dependents in case of death were allowed to receive workmen's compensation benefits and at the same time sue "any party other than the employer." Ala. Code tit. 26, § 312 (1940) (Recomp. 1958), *as amended*, Ala. Code § 25-5-11 (1975). The Alabama Supreme Court interpreted old Section 312 to allow an injured employee who had received all benefits due under the Alabama Workmen's Compensation Act, or his dependents in the case of his death, to sue third parties who were not his employer, including co-employees and executive officers or management officials of the employer corporation. *See United States Fire Insurance Co. v. McCormick*, 286 Ala. 531, 243 So.2d 367 (1970).

In response to the Supreme Court of Alabama's decision in *McCormick, supra*, the Alabama Legislature in 1973 amended § 312 (§ 25-5-11, Code 1975) to provide ". . . neither an officer, director, agent, servant

or employee of the same employer nor his personal representative . . . shall be considered a party other than the employer . . . ." Due to an alleged defect in the manner of passage of this amendment, the same amendment was again passed by the Alabama Legislature in 1975. *See Childers v. Couey*, 348 So.2d 1349 (Ala. 1977). The Alabama Supreme Court has subsequently held that the 1973 amendment was properly enacted [*see Childers, supra*], and thus the immunity granted to co-employees by Ala. Code § 25-5-11 (1975) has been conferred by the Alabama Workmen's Compensation Act since September 1973.

The Alabama Supreme Court in 1978 held unconstitutional that part of Ala. Code § 25-5-11 (1975) which grants immunity to co-employees in personal injury actions [as opposed to wrongful death actions]. *See Grantham v. Denke*, 359 So.2d 785 (Ala. 1978). The Court's decision was based on Section 13 of the Alabama Constitution of 1901, which provides: "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay." The Supreme Court of Alabama reasoned that this section of the Alabama Constitution required a *quid pro quo* between co-employees, which was found to be absent under the Alabama Act, in order to constitutionally eliminate a common law cause of action. 359 So.2d at 787-88. Thus, the status of the Alabama law at the time the instant cases were appealed to the Alabama Supreme Court was that co-employees could be sued as third parties in personal injury actions under Alabama's Workmen's Compensation Act [Ala. Code § 25-5-11 (1975)], but the co-employees were still immune from third-party liability in wrongful death actions.

As noted previously, this Court has not considered the Fourteenth Amendment implications of prohibiting a third-party wrongful death action for a job-related death when the deceased worker could have maintained a personal injury action had he lived. This Court has considered and decided, in *dicta*, that the Fourteenth Amendment is not violated by a workmen's compensation act which immunizes all third parties, making the action for compensation from the employer the exclusive remedy. *See Northern Pacific Railway Co. v. Meese*, 239 U.S. 614, 60 L.Ed. 467, 36 S.Ct. 223 (1916). However, even if this dicta were given controlling effect, the *Meese* decision is not dispositive of the issues raised by this appeal. In *Meese*, the workmen's compensation act under consideration did not differentiate between personal injury and death of employees, but rather treated both the same with regard to the immunity provisions of the Act. Conversely, in the instant cases the immunity is granted to co-employees only in wrongful death actions—had plaintiffs' decedents lived, they could have maintained personal injury actions against the same co-employees pursuant to the Alabama Supreme Court's decision in *Grantham v. Denke*, 359 So.2d 785 (Ala. 1978).

Similarly, lower federal court decisions which have considered co-employee immunity are distinguishable from the instant case on the same basis. For example, in *Keller v. Dravo Corporation*, 441 F.2d 1239 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017, 30 L.Ed.2d 665, 92 S.Ct. 679, the Fifth Circuit Court of Appeals held that the co-employee immunity granted by 33 U.S.C. § 933(i), which provided that an injured employee subject to the Longshoremen's and Harbor Workers' Compensation Act shall have no right of action against

an officer or employee of his employer, did not violate the Fourteenth Amendment. However, as was the case in *Meese, supra*, the act under consideration did not differentiate between personal injury and death of employees in determining immunity from third-party actions, a situation materially different from the one presented by the instant case.

This Court has recognized that when compensation acts are attacked on the basis of the Fourteenth Amendment, the test to be applied in determining their constitutional validity is the rational basis test, i.e., the attempted classification or legislative action must not be arbitrary and unreasonable. *See Jeffrey Manufacturing Co. v. Blagg*, 235 U.S. 571, 59 L.Ed. 364, 35 S.Ct. 167 (1915); *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 63 L.Ed. 1058, 39 S.Ct. 553 (1919). In applying this test, this Court has also noted that state legislatures are authorized by the police power to legislate for the public welfare and thus can make policy decisions in furtherance of the public interest. *See Arizona Copper Co. v. Hammer, supra*. However, and more importantly to the instant cases, this Court has held that there is no present public policy against allowing recovery for wrongful death where, had he lived, decedent could have maintained an action for personal injuries. *See Moragne v. States Marine Lines*, 398 U.S. 375, 390-91, 26 L.Ed.2d 339, 351, 90 S.Ct. 1772, 1782-83 (1970).

Recognizing a non-statutory cause of action for wrongful death, the Court made the following observations in *Moragne:*

> . . . there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for

> a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law . . . . Without going into the reasons for the notion that an action (other than an appeal) does not lie for causing the death of a human being, it is enough to say that they have disappeared. The policy that forbade such an action, if it was more profound than the absence of a remedy when a man's body was hanged and his goods confiscated for the felony, has been shown not to be the policy of present law by statutes of the United States and of most if not all of the States.

398 U.S. at 390-91, 26 L.Ed.2d at 351, 90 S.Ct. at 1782-83. The same absence of public policy was noted by the Supreme Court of Alabama in *King v. Henkie*, 80 Ala. 505, 509 (1876), where the Court observed: "The purpose of this [the Alabama Wrongful Death Act] and like legislation was clearly to correct a defect of the common law by a rule of which it was well settled that a right of action based on a tort or injury to the person died with the person injured."

This Court has already ruled that the object of workmen's compensation acts is the same irrespective of whether the injured workman dies. *See Madera Sugar Pine Co. v. Industrial Accident Commission*, 262 U.S. 499, 67 L.Ed. 1091, 43 S.Ct. 604 (1923). Rejecting the employer's contention that liability should not attach without fault in death cases, the Court stated: "The object of such acts 'is single—to provide for the liability of the employer to make compensation for injuries

received by an employee,' whether to the employee himself or to those who suffer pecuniary loss by reason of his death." 262 U.S. at 501, 67 L.Ed. at 1093, 43 S.Ct. at 605, *quoting, Hayett v. Pennsylvania R. Co.*, 86 N.J.L. 683, 684, 92 A. 58.

Despite the fact that there are no present public policy considerations against allowing recovery for wrongful death and that the legislative objective underlying workmen's compensation acts is the same whether the injured workman lives or whether he dies, the Supreme Court of Alabama upheld Ala. Code § 25-5-11 (1975) against appellants' Fourteenth Amendment attack. The Court did not find that the legislative action was reasonably related to any legitimate object of the legislation or that the classification imposed was reasonably related to such an object. *See* opinion below, p. 1a, *infra.* Conversely, the Alabama Supreme Court specifically noted in *Grantham, supra,* that upholding the immunity granted to co-employees by Ala. Code § 25-5-11 (1975) "would be no deterrent to negligent work performance upon the part of one's fellow worker and thus defeat the desired aim of the law to promote safety on the job." 359 So.2d at 788.

Alabama has imposed Ala. Code § 25-5-11 (1975) in such a way that there can be no recovery against co-employees for the ultimate personal injury, death, although an action would lie if the worker does not die. The absence of any discernible state interest in so differentiating between death and personal injury raises substantial questions under the Fourteenth Amendment to the United States Constitution. *Cf. Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 31 L.Ed.2d 768, 92 S.Ct. 1400 (1972).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT OF ALABAMA

Nos. 77-110, 77-218 and 77-499

RUDOLPH SLAGLE

v.

LUTHER PARKER, *et al.*

HELEN J. HAMRICK, *et al.*

v.

UNITED STATES PIPE & FOUNDRY CO., *et al.*

ELCER MAE MASON, *et al.*

v.

RANDY ADAMS, *et al.*

April 6, 1979

Rehearing Denied May 4, 1979

* * *

Lanny S. Vines and Donald G. Beebe, Birmingham, for Rudolph Slagle and Elcer Mae Mason, appellants.

John B. Tally, Jr. and Robert D. Hunter, Birmingham, for appellees.

MADDOX, Justice.

The parties agree that the issues presented in these appeals are:

1. Do the provisions of amendments to the Workmen's Compensation Act which immunize a co-employee against suit for a covered accident apply to wrongful death actions?

2. Does the statute which grants immunity to co-employees violate the equal protection and due process clauses of the Alabama and United States Constitutions?

The facts succinctly stated are:

Dennis Slagle, in the course of his employment with the Reynolds Metals Company, suffered fatal injuries. Slagle was survived by no dependents. Reynolds Metals Company has paid all benefits due under the Workmen's Compensation Act on account of Slagle's death. Defendants Luther Parker, J. F. Newman, Danny Altman, Ed Miller, and Leon Folsom were co-employees of the decedent.

Max Mason, in the course of his employment with the Buchanan Contracting Company, suffered fatal injuries. Buchanan Contracting Company has paid all benefits due under the Alabama Workmen's Compensation Act. It is alleged that the plaintiff, Elcer Mae Mason, was the dependent mother of the decedent. Defendants Randy Adams, A. W. Henson, Billy Alverson and Howard Buchanan were co-employees of the decedent.

Douglas Hamrick, in the course of his employment with United States Pipe & Foundry Company, suffered fatal injuries. United States Pipe & Foundry has paid all benefits due under the Alabama Workmen's Compensation Act. It is alleged that the plaintiff was a dependent of the decedent. Defendants Max Edward, Max Powell, Cecil Colburn, Sam Smith, C. H. Campbell, Howard Roper, Jim Bradfield and Paul Atchison were co-employees of the decedent.

All three deaths occurred after the enactment of the 1973 or 1975 amendments to § 312 of the Alabama Workmen's Act (now Code 1975, § 25-5-11) which immunized employees from suit by their co-employees arising from job-related accidents. These amendments are Act No. 1062, § 26, Acts of Alabama, 1973, and Act No. 86, 4th Ex. Sess., § 10, Acts of Alabama, 1975.

We hold that the legislature could grant immunity to co-employees of a decedent covered by the Workmen's Compensation Act from suit for wrongful death where the death arose out of a job-related accident, and, therefore, we affirm the grant of summary judgment in each case.

Appellants, representatives of the deceaseds, argue that this Court, in *Grantham v. Denke,* 359 So.2d 785 (1978), and *Pipkin v. Southern Electrical and Pipe Fitting Co., Inc.,* 358 So.2d 1015 (1978), squarely and forthrightly declared these immunity provisions violative of Section 13 of the Alabama Constitution, and that Section 13 makes no distinction between common law and statutory causes of action. In short, they claim *Grantham* and *Pipkin* are dispositive of the first issue.

Appellants argue as to the second issue that to hold co-employee immunity still in effect in wrongful death cases when it has been declared void in personal injury cases, would be violative of equal protection provisions of both the Alabama and United States Constitutions. They say there would be no reasonable purpose for such disparate treatment.

Appellants' arguments are persuasive, but to adopt them would be to overturn many prior judicial interpretations which have been rendered on the character and nature of wrongful death actions.

In Alabama, actions for wrongful death are purely statutory. No such action was known at common law. *White v. Ward*, 157 Ala. 345, 47 So. 166 (1908); *Kennedy v. Davis*, 171 Ala. 609, 55 So. 104 (1911). Since the right to bring an action for wrongful death is a product of the legislature, it can be modified, limited, or repealed as the legislature sees fit, except as to causes of action which have already accrued. *Slagle v. Reynolds Metals Company*, 344 So.2d 1216 (Ala. 1977); *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939). Thus in the previous appeal of the *Slagle* case, 344 So.2d 1216, this Court held it constitutionally permissible for the legislature through the Workmen's Compensation Act to deprive a father of his right to sue for the wrongful death of his son under § 6-5-391. There the Court stated:

> *"The Legislature could take away all remedy for injuries resulting in death, or condition it as it saw fit. It could provide, as it has done under the Workmen's Compensation Act, and as it does in many death damages cases in other states, for a strictly limited kind of recovery."* 344 So.2d at 1218 [emphasis in original], citing *Patterson v. Sears, Roebuck & Co.*, 196 F.2d 947 (5th Cir. 1952).

The causes of action upon which these three appeals are based all arose after the effective date of the 1973 or 1975 amendments which granted immunity from suits by employees injured in the course of their employment to all employees covered by the Workmen's Compensation Act. None of the plaintiffs had any vested right which was a "property" protected by the Due Process clause. The amendments are not violative of the Due Process clause of the Fourteenth Amendment to the United States Constitution, or of any provisions of the Alabama Constitution.

AFFIRMED.

TORBERT, C. J., concurs.

BLOODWORTH, ALMON and SHORES, JJ., concur specially.

FAULKNER, JONES, EMBRY and BEATTY, JJ., dissent.

BLOODWORTH, Justice (concurring specially).

I concur in the opinion for the court authored by Justice Maddox. It is consistent with *Grantham v. Denke*, 359 So.2d 785 (Ala. 1978), which held that co-employee immunity "would deprive [an injured employee] of rights and remedies he enjoyed under the *common law* which are preserved under § 13 of our constitution." *Id.* at 787 [emphasis supplied]. *Grantham* also stated that the 1947 amendment to the workmen's compensation legislation "was merely declaratory of the *common law rights* of the injured employee as they existed before its enactment and as preserved by § 13 of our constitution." *Id.* at 788 [emphasis supplied]. Because wrongful death actions are purely statutory, the reasoning of *Grantham* does not apply to the instant cases. I agree with Justice Maddox that what the legislature has given, it may take away so long as the right has not vested.

I also agree with Justice Shores who notes that an anomalous situation now exists—"A co-employee can be sued for personal injury, but not for wrongful death." But, anomalies do not dictate results.

ALMON, J., concurs.

SHORES, Justice (concurring specially).

This result is logically sound, but *Grantham v. Denke*, bottomed as it is on § 13 of the Constitution of 1901,

compels it. A curious situation now exists. A co-employee can be sued for personal injury, but not for wrongful death. That result is dictated by *Grantham v. Denke*, however.

EMBRY, Justice (dissenting):

I respectfully dissent from the opinion of the majority and would agree with my brother Beatty in that part of his dissent wherein he would hold that immunity from suit granted to co-employees under the provisions of Code 1975, § 25-5-11, is a violation of the equal protection clause, Amendment Fourteen to the Constitution of the United States. I would further hold that such immunity violates the equal protection of the laws of the Constitution of Alabama found in Sections 1, 6 and 22. See generally *Harrison v. Buckhalt,* 364 So.2d 288 (Ala. 1978).

I vehemently disagree with the statement in my brother Beatty's dissent that the rationale of the majority in *Grantham* was erroneous. In my judgment, the rationale is entirely sound and amply supported by reason and the authorities cited in that opinion. In my view, additional support of the rationale in *Grantham* may be found in the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal protection of the laws provisions of the Alabama Constitution.

In my brother Beatty's present view, which obviously differs from the belief he entertained when concurring in *Grantham,* he would approve the right of the Legislature to abolish causes of action. He cites as examples of that right the constitutionality of our motor vehicle guest statute, Code 1975, § 32-1-2, when tested against § 13 of the Alabama Constitution, as well as the abolition of

actions for alienation of affections, criminal conversation, seduction of females of 21 years and over, and for breach of promise to marry. That is not inconsistent with the rationale of *Grantham.* In each instance, both with regard to the constitutionality of the guest statute, and abolition of the causes of action enumerated, there was the overriding police power consideration to eradicate a perceived social evil. In *Grantham,* the majority pointed this out regarding the guest statute.

FAULKNER, J., concurs.

BEATTY, Justice (dissenting):

The defendants/appellees have placed in issue the effect of Section 13 of the Alabama Constitution upon actions for wrongful death. But they go further and challenge this Court's construction of Section 13 contained in *Grantham v. Denke,* 359 So.2d 785 (Ala. 1978). A review of that sections's history, together with this Court's interpretations of it, has convinced me that our rationale in *Grantham* was erroneous; that the decisions should have been supported by other principles. Because I concurred in the majority opinion in *Grantham,* I believe it is incumbent upon me to correct what, I am now convinced, was an incorrect basis in law for that decision. And I regret that my brother Embry's disappointment in my attempt to explain my redemption has caused such a vehement response.

In *Grantham* we held that Section 13 preserved a right of action and preserved a remedy for its enforcement, thus preventing the legislature from abrogating any cause of action which an employee covered under Workmen's Compensation would have against a fellow employee. Our theory was that such a common law "right" could

not be so limited because there was no elective substitute remedy, and thus any legislative action to the contrary was effectively prevented. Analogy to a similar Arizona constitutional provision was utilized in reaching that conclusion.

Rather than being dependent upon a similar provision of a sister state, the interpretation of Section 13 reasonably ought to be governed by pertinent decisions of our own Court unless, of course, these in themselves are misconceived. *Cf. Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978).

As stated in *Swann & Billups v. Kidd*, 79 Ala. 431, 432 (1885) (construing the precursor of Section 13 contained in the Alabama Constitution of 1875):

> This clause is known to have been taken in substance from Magna Charta; and history shows that its chief purpose was to assail the existing evil of anciently holding courts in clandestine sessions, and of paying fines to the king and his officers, for delaying or expediting lawsuits, and for obtaining justice.

See also *State v. Bush*, 12 Ala. App. 309, 312, 68 So. 492 (1915).

Further explanation was made by this Court in *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939), a case in which the "guest statute" was challenged because its adoption had eliminated a cause of action in negligence against an automobile operator, a cause of action which had existed at common law. Writing directly to the meaning of Section 13 our Court stated at 545, 192 So. at 263-264:

> It will be noticed that this provision preserved the right to a remedy for an injury. That means that

> when a duty has been breached producing a legal claim for damages, such claimant cannot be denied the benefit of his claim for the absence of a remedy. But this provision does not undertake to preserve existing duties against legislative change made before the breach occurs. There can be no legal claim for damages to the person or property of any one except as it follows from the breach of a legal duty.
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> * * *
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> Undoubtedly the right to the remedy must remain and cannot be curtailed after the injury has occurred and right of action vested, regardless of the source of the duty which was breached, provided it remained in existence when the breach occurred. . . . This includes such items of damages as were legally subject to recovery at the time of the breach.
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> * * *
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> But section 13, *supra*, does not in language, nor intent, prevent the legislature from changing a rule of duty to apply to transactions which may occur thereafter. If there exists any such prohibition it must be found elsewhere in the Constitution.

Thereafter the Court explored other aspects of constitutional law relevant to the change of law in question, but those later considerations did not modify its view of Section 13. My brother Embry's continuing analysis of his opinion in *Grantham* simply fails to appreciate the prior decisions of this Court interpreting that constitutional section. *Pickett v. Matthews, supra.*

The views contained in *Pickett* are consistent with other changes. *Young v. Young*, 236 Ala. 627, 184 So. 187 (1938), discusses with approval the legislature's abolishing actions for alienation of affections, criminal conversation, seduction of females of 21 years and over, and for breach of promise to marry. Accord (as to

alienation of affections and criminal conversation), *Henley v. Rockett*, 243 Ala. 172, 8 So.2d 852 (1942).

Nevertheless, I believe that the immunity from suit granted by the provision in question to the class of "co-employees" is a violation of the equal protection clause, Amendment Fourteen, United States Constitution. This result follows when the classification is measured against the test set forth in *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561-562, 64 L.Ed. 989 (1920):

> [t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .

Admittedly the Workmen's Compensation statutes were and are *sui generis*, creating new rights and remedies based upon a conception of compensation independent of existing theories of the common law, *Pound v. Gaulding*, 237 Ala. 387, 187 So. 468 (1939), and intended to operate between master and servant as a substitute for other theories of recovery for personal injuries. *Gentry v. Swann Chemical Co.*, 234 Ala. 313, 174 So. 530 (1937). However, while there may have been indirect or unsubstantial objects in their enactment, their primary purpose was to require industry to "bear part of the burden of disability and death, resulting from the hazards of industry." *Pow v. Southern Construction Co.*, 235 Ala. 580, 180 So. 288 (1938). That being their main object, and given their beneficent character, *cf. Bell v. Driskill*, 282 Ala. 640, 213 So.2d 806 (1968), I fail to discern any purpose in the overall object of the legislation to limit the employee's recourse beyond the industry-master-employer relationship. So much of the classification in question which grants immunity to certain

co-employees is therefore not consonant with and thus bears no "fair and substantial relation" to the "object of the legislation."

This conclusion also leads me to believe that the classification established is an arbitrary one, for if the purpose of the legislation is to make industry bear part of the losses which are due to industrial accidents, why is it necessary to prohibit suits against co-employees who may also be responsible, as other citizens are by law permitted to do? *Cf. Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978); *Norris v. Seibels*, 353 So.2d 1165 (Ala. 1977). In my view, therefore, to deny the covered employee or his survivor the opportunity to pursue a tortfeasor under these circumstances results in an arbitrary classification equating a denial of equal protection. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

JONES, J., concurs.

IN THE
SUPREME COURT OF ALABAMA

[Filed July 1979]

RUDOLPH SLAGLE, *Appellant,* *v.* LUTHER PARKS, J. F. NEWMAN, DANNY ALTMAN, ED MILLER, and LEON FOLSOM, *Appellees.*	S.C. 77-110
HELEN J. HAMRICK, *Appellant,* *v.* MAX EWARD, MAX POWELL, CECIL COLBURN, SAM SMITH, C. H. CAMPBELL, HAROLD ROPER, JIM BRADFIELD, and PAUL ATCHISON, *Appellees.*	S.C. 77-218
ELCER MAE MASON, *et al.* *Appellant,* *v.* RANDY ADAMS, J. W. HINSON, BILLY ALVERSON, and HOWARD BUCHANAN, *Appellees.*	S.C. 77-499

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rudolph Slagle, Helen J. Hamrick, and Elcer Mae Mason, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Alabama, affirming the summary judgments granted by the trial court, entered in these actions on April 6, 1979, rehearing denied May 4, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Lanny S. Vines
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 1979, copies of the foregoing Notice of Appeal to the Supreme Court of the United States were mailed, postage prepaid, to Robert D. Hunter, Esq., 1700 First Alabama Bank Building, Birmingham, Alabama 35203, John B. Tally, Jr., Esq., 1700 First Alabama Bank Building, Birmingham, Alabama 35203, and Lyman H. Harris, Esq., 1415 First Alabama Bank Building, Birmingham, Alabama 35203, counsel for Appellees. I further certify that all parties required to be served have been served.

/s/ Lanny S. Vines
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